No. 9400

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GARDEN CITY CANNING COMPANY,
Appellant,

vs.

WILLIAM ADDY, J. B. BOWEN, J. T. HEIDOTTING, R. J. SUTTON and JOHN SAUNDERS,
Appellees.

APPELLANT'S OPENING BRIEF.

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BASIS OF COURT'S JURISDICTION.

The jurisdiction of the District Court was invoked by the filing of a debtor's petition on February 6th, 1936 under the provisions of section 77B[1] of the Act of Congress relating to bankruptcy.

11 U.S.C., section 207[1]. (Tr. page 1.)

This petition was approved as properly filed. (Tr. page 2.)

The jurisdiction of this Court is invoked under section 24[2] of the Act of Congress relating to bankruptcy, by appeal from an order denying the debtor a final discharge.

11 U.S.C., section 47[2].

[1]Refers to sections of Bankruptcy Act and U.S.C. prior to amendments of June 22nd, 1938.

[2]Refers to sections of Bankruptcy Act and U.S.C. subsequent to amendments of June 22nd, 1938.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court (Tr. page 152), made in the course of proceedings under section 77B of the Bankruptcy Act, rejecting a Special Master's report (Tr. pages 79 ff.) and denying the application of the debtor for a final decree closing the proceedings and granting the debtor a final discharge. (Tr. page 76.) Objections to said application were filed by appellees (Tr. page 76) on the ground that appellees had not been paid under the plan of reorganization.

It is conceded that appellees were not paid. Appellant contends that under the facts hereinafter set forth appellees could not object to the discharge on this or any other ground.

The proceedings in the District Court were instituted on February 6th, 1936 when Garden City Canning Co., hereinafter referred to as the debtor, filed its petition for reorganization under section 77B of the Bankruptcy Act. On the same day an order was made approving the petition. (Tr. pages 1 and 2.)

The debtor thereafter filed its verified list of creditors and stockholders (Tr. pages 8 ff.) and notice was given them of the hearing, at which time the Court might make permanent its order of February 6th, 1936 or appoint a trustee or trustees or make such other order as might be necessary in the proceedings. (Tr. page 2.)

On March 12th, 1936, the continued date of this hearing, the District Court made its order permitting the debtor to remain in permanent possession of its

assets, and referring the proceedings to Honorable Burton J. Wyman, a Referee in Bankruptcy of said Court, as Special Master. (Tr. page 13.) This meeting was attended by counsel for the appellees. (Tr. page 117.)

The order of March 12th, 1936 (Tr. pages 13 ff.) provided in part as follows:

> "That the debtor herein shall file * * * its plan of reorganization which plan shall set forth in detail in what manner if at all, the rights, liens and equities of creditors and stockholders will be affected by said plan *if it be confirmed.*" (Tr. page 16.)
>
> "That any and *all* issues or *matters arising in these proceedings* * * * be and they are hereby referred for consideration and report to Honorable Burton J. Wyman * * * and *upon the conclusion of said hearing* before said Special Master, he is hereby directed and instructed to report to this court with all convenient speed, the testimony taken before him, his findings of fact, conclusions of law and recommendations. * * *" (Tr. pages 16-17.)
>
> "That the claims and interest of creditors and stockholders shall be filed or evidenced and allowed in the following manner: All claims of creditors shall be filed in the manner herein provided, on or before the 15th day of June, 1936, and unless so filed on or before said date, no such claim may participate in any plan of reorganization, except upon an order first had and obtained from the court on good cause shown; that upon the filing of claims of creditors and stockholders, in the manner required by law, in relation to the proving of claims in debtor's pro-

> ceedings under Section 77B of the Bankruptcy Act, each of them shall be deemed finally allowed in these proceedings unless the debtor * * * shall object to the allowance of any such claims by filing an objection with the Special Master. * * *" (Tr. page 18.)
>
> "That the debtor shall, on or before the 2nd day of April, 1936, give notice of the making and entry of this order to all the creditors * * * by mailing a copy of this order or a brief summary thereof in form satisfactory and approved by the Special Master to such creditors * * * and by causing the publication of said brief summary * * *." (Tr. page 22.)

On April 10th, 1936 a summary of said order (Tr. page 104) was mailed to creditors. (Tr. page 3.) This summary, or notice, contained the following provision:

> "Said order further provides that in order to participate in the plan of reorganization, creditors must file their claims in the form prescribed by the Acts of Congress relating to Bankruptcy on or before the 15th day of June, 1936, *said claims to be filed in the office of the Special Master, 1095 Market Street, San Francisco, California.*" (Tr. page 104.)

Pursuant to the order of March 12th, 1936, this notice was approved by the Special Master before being published and mailed to the creditors including appellees. (Tr. page 33.)

On April 30th, 1936 the debtor filed its proposed plan of reorganization (Tr. pages 34 ff.) wherein it agreed to pay its creditors fifty per cent (50%) of

the amount of their claims. The plan, as filed, contained the following provision:

> "This plan of reorganization is to become effective when consents by or on behalf of creditors holding more than two-thirds (⅔) in amount of claims against debtor whose claims are provable and allowable and who would be affected by the plan of reorganization are filed *in the office of Honorable Burton J. Wyman, Special Master* of the above entitled court, 1095 Market Street, San Francisco, California, *and an order is made by the above entitled court approving this plan of reorganization.*" (Tr. page 42.)

A mimeographed copy of the plan of reorganization together with a form of consent (Tr. page 43) and form of proof of claim (Tr. page 44) were mailed to all of the creditors listed in the debtor's schedules, including appellees. (Tr. page 120.)

Thereafter, thirty-five (35) creditors filed claims, totalling Nineteen Thousand Two Hundred Eighty-eight and 32/100 Dollars ($19,288.32), with the Special Master. (Tr. page 68.)

On June 4th, 1936, and within the time fixed for filing claims (June 15th, 1936), appellees, through Loyd E. Hewitt, their attorney, filed their claims in the office of the clerk of the United States District Court. (Tr. pages 48 to 60.) These claims were for the amounts set forth after appellees' names in the debtor's schedules (Tr. pages 44 ff.), and in the plan, save that in the case of appellee John Saunders, the debtor listed the claim at Three Hundred Sixty-four and 40/100 Dollars ($364.40), whereas said appellee

filed his claim for Fifteen Hundred Seventy-seven and 70/100 Dollars ($1,577.70). (Tr. page 57.) Neither the debtor nor its attorneys had any knowledge that these claims were filed with the clerk of the District Court until approximately January 22nd, 1938, thirteen months after the confirmation of the plan. (Tr. pages 111, 113.)

On November 4th, 1936 the debtor filed its petition for confirmation of its plan of reorganization. (Tr. page 61.) This petition contained the following recital:

> "That annexed hereto and made a part hereof and marked Exhibit 'B' is a list of all proofs of claim which have been filed herein within the time within which claims can be filed." (Tr. page 63.)

Neither the names of appellees nor those of fourteen (14) other creditors of the debtor, who did not file claims, were included in said Exhibit "B".

Upon the filing of said petition for confirmation of the plan the Special Master called a meeting of creditors (Tr. page 66) and approved the form of notice of the hearing of the petition for confirmation (Tr. page 106), which notice was mailed to all of the creditors of the debtor, including the appellees. (Tr. page 5.) This notice specifically advised creditors that at said meeting they could appear and produce any evidence or argument in opposition to the confirmation of the plan. No creditors appeared at this meeting. (Tr. pages 69, 107.)

Thereafter, the Special Master filed his report recommending confirmation of the plan of reorganization. (Tr. page 67.)

The Master's report contains the following recitals:

"That pursuant to notice given by said debtor to its creditors thirty-five (35) creditors of said debtor filed and propounded herein their claims, which said claims amount to the sum of Nineteen Thousand Two Hundred Eighty-eight and 32/100 Dollars ($19,288.32); a list of said claims [this list was Exhibit 'B' to the petition for confirmation which did not include the names of appellees] is attached to the petition for confirmation of reorganization plan forwarded with this report." (Tr. page 68.)

"That only two (2) creditors failed to file consents to said plan of reorganization; namely, Press Smith with a claim of Eleven Hundred Sixty-three Dollars ($1,163.00) and W. P. Fuller & Co. with a claim of Seventeen and 19/100 Dollars ($17.19)." (Tr. page 69.) [Neither the five (5) appellees nor the other fourteen (14) creditors who did not file claims filed consents to the plan of reorganization.]

"That by said order of March 2nd [12th] all creditors of the debtor were directed to file proofs of claim *with said Special Master* on or before the 15th day of June, 1936, *notice whereof was duly given by the debtor to all creditors* by mail and published as and by said order provided." (Tr. page 70.)

On December 15th, 1936 the District Court (Honorable Harold Louderback) entered its order approv-

ing the plan of reorganization (Tr. page 74), which order contained the following recital:

> "It Is Hereby Ordered that the report of Honorable Burton J. Wyman, Referee in Bankruptcy and Special Master, be and the same is hereby fully approved and confirmed to stand as the findings of this court." (Tr. page 74.)

No creditors appeared at the time set for the hearing of the petition for confirmation. (Tr. page 74.)

At the time the debtor proposed its plan of reorganization it did not have the funds with which to make the payments provided for by the plan but subsequently borrowed Ten Thousand Dollars ($10,000.) from the Pacific Can Company for this purpose (Tr. page 113) and gave the Pacific Can Company a lien on its pack of canned goods. (Tr. page 114.)

The debtor subsequently paid all creditors who had filed claims with the Special Master fifty per cent (50%) of their claims as provided for by the plan of reorganization and filed its petition for a final discharge. (Tr. page 76.)

On January 22nd, 1938 appellees filed a petition objecting to the debtor's petition for a discharge on the ground that although all other creditors had been paid the claims of appellees had not been paid. (Tr. page 79.) When service of this petition was made on counsel for appellant, appellant and its attorneys learned for the first time that appellees' claims had been filed with the Clerk of the District Court. (Tr. pages 111-113.)

At the time appellees' petition was filed objecting to the debtor's application for a discharge, the debtor had not been operating its cannery since the summer of 1937, had incurred obligations to new creditors and, in addition, was indebted to the Pacific Can Company in the sum of Twenty-five Thousand Dollars ($25,000.), secured by warehouse receipts on the debtor's entire inventory, the value of which inventory just about equalled the indebtedness to the Pacific Can Company. (Tr. pages 113, 114.)

The questions therefore presented are whether appellees were bound by the order of the District Court dated December 15th, 1936, made after notice to them confirming the debtor's plan of reorganization so that they could not thereafter contend by way of objections to the debtor's petition for a final discharge that they were entitled to payment under the plan of reorganization as the same was confirmed by the Court; and, further, whether appellees were barred by their laches and by reason of the debtor having changed its position based on appellees' conduct from objecting to the debtor's petition for a final discharge.

SPECIFICATIONS OF ERRORS RELIED UPON.

Appellant relies upon each and all of the specifications set forth in the Designation of Points to be Relied Upon on Appeal set forth in the Transcript of Record. (Tr. pages 159 ff.)

ARGUMENT.

I.

THE ORDER CONFIRMING THE PLAN OF REORGANIZATION BEING A FINAL ORDER OF THE DISTRICT COURT AND HAVING BEEN MADE ON NOTICE TO APPELLEES THEY ARE BOUND BY THE TERMS THEREOF.

(Point No. 2, Tr. page 160.)

THE ISSUES RAISED BY APPELLEES BEFORE THE DISTRICT COURT ARE RES ADJUDICATA BY REASON OF THE FINAL ORDER OF THE DISTRICT COURT APPROVING THE PLAN OF REORGANIZATION.

(Point No. 7, Tr. page 161.)

The Order of the District Court made by Judge Louderback on the 15th day of December, 1936, confirming the plan of reorganization, adopted the report of the Special Master to whom "all issues and matters arising in these proceedings" (Tr. page 16) were referred, as the findings of the Court. (Tr. page 74.)

The District Court therefore found:

1. That only thirty-five (35) creditors filed claims, these being the creditors set forth in Exhibit B to the debtor's petition for confirmation of its plan of reorganization and did not include the claim of appellees;

2. That only two named creditors failed to consent to the plan of reorganization (if appellees were to be counted there would have been seven non-consenting creditors exclusive of the fourteen other creditors who did not file claims); and

3. *That all creditors were directed to file their claims with the Special Master.*

When this order of the District Court became final appellees lost their right to contend that they were entitled to share in the payments to be made under the plan of reorganization. This order was a reviewable order under the provisions of section 24B of the Bankruptcy Act (11 U.S.C. 47B) as said section then read.

In re Botany Consolidated Mills, 89 Fed. (2d) 223;

Downtown Inv. Association v. Boston Metropolitan Building, 81 Fed. (2d) 314;

Texas Hotel Securities Corp. v. Waco Development Co., 87 Fed. (2d) 395.

Appellees have urged below that the Special Master was without authority to designate his office as the place where the claims of creditors were to be filed in that the order of the District Court dated March 12th, 1936 (Tr. pages 13 ff.) fixed the time within which claims had to be filed but was silent as to the place where said claims had to be filed.

There are two answers to this contention, both of which are conclusive: The Special Master had authority under the order of reference to require claims to be filed in his office. No appeal was taken from the order which confirmed the plan of reorganization and directed that distribution be made to the creditors who had filed claims with the Special Master.

The Special Master had authority to direct that creditors' claims be filed in his office for the following reasons:

1. *All issues and matters arising in the proceedings* were referred to the Special Master for hearing, consideration and report. (Tr. pages 16, 17.) The Master, accordingly, exercised the power to fix the place for the filing of claims, which power was vested in the District Judge by section 77B(6) of the Bankruptcy Act. This was one of the "matters" arising in the proceeding which was referred to the Special Master and which he later reported to the Court pursuant to the direction contained in the order of reference.

Equity Rule 62, which was in force at the time of this reference, dealing with the powers of a Master, provided in part as follows:

> "The Master shall * * * have full authority * * * generally to *do all other acts,* and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties."

Equity Rule 62 was applicable to references to Special Masters in bankruptcy proceedings.

In re Automatic Musical Co., 204 Fed. 334.

The Supreme Court of the United States in *Story v. Livingston,* 38 U. S. 359, 367, discussing the power of a Master to take testimony even though the order of reference did not specifically empower him to do so, stated:

> "* * * the order need not particularly empower * * * [the Master] to take testimony, if the subject matter is only to be ascertained by evidence."

2. The order of the District Court of March 12th, 1936 required the Master to pass on any objections that might be propounded to claims filed against the debtor. (Tr. pages 18, 19.) This necessarily required the claims to be before the Special Master.

3. The order of the District Court dated March 12th, 1936 directed that the debtor forward a summary of said order to its creditors in a form satisfactory to the Master. (Tr. page 22.) A notice (Tr. page 104) formally approved by the Master was forwarded to all creditors, including the appellees, which notice contained a summary of the order of March 12th and which notice further directed creditors to file their claims in the office of the Special Master.

4. When the District Court confirmed the Special Master's report on December 15th, 1936 and adopted the report as the findings of the District Court it approved the Master's exercise of the power to direct that claims be filed in his office.

Appellees received the notice so approved by the Master directing that claims be filed in the office of the Special Master on or before June 15th, 1936. This was the only notice relative to the filing of claims that appellees did receive.

Their counsel admittedly knew of the date specified in this notice before which claims had to be filed. (Tr. page 88.) If appellees neglected to inform him of the place where their claims were to be filed, the debtor's lack of knowledge that the claims were filed with the District Court instead of with the Special Master was due to appellees' negligence in advising

their counsel and not to the debtor's negligence. If the clerk of the District Court was under a duty to transmit the claims to the Special Master (and appellant agrees with the Special Master [Tr. page 143] that the clerk was under no such duty), his failure to so transmit the claims must be chargeable to the appellees who delivered their claims to the clerk and not to the debtor who had notified appellees to file their claims with the Master.

Appellees have also urged below—and this appears to be the basis of the decision of the District Court —that as the debtor's schedules list appellees as creditors and as the plan itself provided for payment to appellees (to Appellee Saunders in an amount different from that which he alleged to be due him in his claim), appellees were entitled to receive payment upon confirmation of the plan.

This argument overlooks the following points:

1. There were fourteen (14) creditors in addition to appellees who, for reasons best known to them, failed to file claims. There was, therefore, no reason for the debtor to suspect that appellees had filed claims in a place other than that designated by the Special Master. Many creditors in bankruptcy and reorganization proceedings do not file claims in order not to submit themselves to the summary jurisdiction of the Bankruptcy Court.

2. Under section 77B of the Bankruptcy Act as distinguished from Chapter X [section 224(2)], distribution could only be made to creditors whose claims were proved and allowed.

Bankruptcy Act, section 77Bc(6).

3. It is not the plan as proposed that governs payment but the plan as confirmed by the Court.

> "Upon final confirmation of the plan the debtor * * * shall put into effect and carry out the plan and *the order of the Judge relative thereto, under and subject to the supervision and control of the court.*"
>
> *Bankruptcy Act,* section 77Bh.

The answers to any contentions that appellees might make revert to the fact that the order of the District Court made by Judge Louderback on December 15th, 1936 was conclusive—in the absence of an appeal therefrom—that distribution was to be made to the thirty-five (35) creditors specified in the Special Master's report adopted by the District Court.

> "Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."
>
> *Bankruptcy Act,* section 77Bg.

To summarize this argument: debtors were not entitled to be paid under the order confirming the plan of reorganization from which no appeal was taken. The order confirming the plan is binding on all creditors. On the debtor's petition for a final discharge, the question is whether the plan as confirmed has been carried out by the debtor.

"Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid."

Bankruptcy Act, section 77Bh;

In re Munson S. S. Lines, 80 Fed. (2d) 859, 860;

In re Paramount Publix Corp., 82 Fed. (2d) 230;

10 *Remington on Bankruptcy,* sections 4629, 4630.

Section 228 of Chapter X of the Bankruptcy Act as amended in 1938, which section was merely intended to clarify but not to change section 77Bh, states that upon the *consummation* of the plan, the Judge shall enter a final decree.

Weinstein's Comparative Analysis of Bankruptcy Law of 1938, p. 241.

There can be no question but that the plan as confirmed by the order of the District Court made by Judge Louderback, which order set forth that only thirty-five named creditors had proved claims, has been fully consummated. When Judge St. Sure subsequently entered the order of the District Court denying the debtor's application for a final discharge on the ground that the appellees should have been paid by the debtor he, in effect, reversed the order of that Court made by Judge Louderback almost two years

previously, from which order no appeal had been taken.

It is well settled that an order in a case within the jurisdiction of the Judge making it cannot be held void or disregarded by another Judge in the same Court before whom the case later comes.

> "His orders are the law of this court and they can only be set aside by a court authorized to reverse its decree."
>
> *In re Thomas,* 35 Fed. 337, 339.

To the same effect see:

Wakelee v. Davis, 44 Fed. 532;

Taylor v. Decatur Mineral & Land Co., 112 Fed. 449.

II.

APPELLEES ARE ESTOPPED FROM OBJECTING TO THE APPELLANT'S APPLICATION FOR A DISCHARGE BECAUSE ALTHOUGH THEY RECEIVED NOTICE REQUIRING THEM TO FILE THEIR CLAIMS WITH THE SPECIAL MASTER IN THE ABOVE ENTITLED PROCEEDINGS THEY DISREGARDED SAID NOTICE AND UNKNOWN TO APPELLANT AND ITS ATTORNEYS THEY FILED THEIR SAID CLAIMS IN THE OFFICE OF THE CLERK OF THE DISTRICT COURT.

(Point No. 3, Tr. page 160.)

APPELLEES DID NOT FOLLOW THE LAW AND THE GENERAL ORDERS OF THE SUPREME COURT IN FILING THEIR SAID CLAIMS IN THE REORGANIZATION PROCEEDINGS AND APPELLANT, BELIEVING THAT SAID CLAIMS HAD NOT BEEN FILED, BORROWED SUFFICIENT MONEY TO PAY THE CLAIMS OF CREDITORS THAT HAD BEEN FILED AS REPORTED IN THE PETITION TO CONFIRM THE PLAN OF REORGANIZATION, WHICH PLAN WAS CONFIRMED AFTER NOTICE TO THE APPELLEES; THAT APPELLANT AT THE PRESENT TIME HAS NO ASSETS.

(Point No. 4, Tr. page 160.)

APPELLEES ARE ESTOPPED FROM OBJECTING TO THE FINAL DISCHARGE OF APPELLANT AS THEIR FAILURE TO PROPERLY FILE THEIR CLAIMS WAS DUE TO THEIR OWN NEGLIGENCE AND BY REASON OF SAID NEGLIGENCE APPELLANT HAS IN GOOD FAITH PAID THE REMAINING CREDITORS, WHO FILED THEIR CLAIMS IN ACCORDANCE WITH THE NOTICE APPROVED BY THE COURT, THE SUM DUE THEM, AND APPELLANT, IN ORDER TO OBTAIN THE MONEY REQUIRED TO BE PAID UNDER SAID PLAN OF REORGANIZATION AS CONFIRMED, DIVESTED ITSELF OF ALL OF ITS ASSETS.

(Point No. 5, page 160.)

APPELLEES ARE ESTOPPED FROM OBJECTING TO THE DISCHARGE OF APPELLANT IN THAT APPELLEES HAD NOTICE OF THE HEARING OF THE PETITION FOR CONFIRMATION OF THE PLAN OF REORGANIZATION AND HAD THEY APPEARED AT THAT TIME THE DISTRICT COURT WOULD HAVE HAD THE POWER TO MAKE PROVISION FOR THE PAYMENT TO SAID APPELLEES OR REQUIRED THE APPELLANT TO FILE AN AMENDED PLAN OF REORGANIZATION, BUT, ON THE CONTRARY, APPELLEES, BY THEIR FAILURE TO APPEAR, PERMITTED THE DISTRICT COURT TO GRANT APPELLANT'S PETITION FOR CONFIRMATION OF THE PLAN OF REORGANIZATION, WHICH PETITION MADE NO PROVISION FOR PAYMENT TO APPELLEES.

(Point No. 6, Tr. page 161.)

By reason of appellees' laches and the debtor's change of position resulting from appellees' conduct, appellees were not in a position to object to the debtor's petition for a final discharge.

When counsel for the appellees forwarded the appellees' claims to the clerk of the District Court he knew that he might not be complying with the order with reference to the filing of claims for he wrote the clerk:

> "Will you please file the same and see that they are referred to the *proper Referee.* The last day of filing is June 15th, 1936. * * * If these are not in proper form will you return them to me by return mail at my expense, stating in what portion they should be amended or corrected." (Tr. page 88.)

In the absence of an order of liquidation, and no such order was ever made in this matter, there could be no Referee in Bankruptcy in a proceeding under

section 77B. Therefore, the clerk could not refer the claims to a Referee.

The claim of appellee Saunders was filed in the sum of Fifteen Hundred Seventy-seven and 70/100 Dollars ($1,577.70), whereas the debtor, in its schedules, only conceded an indebtedness due Saunders in the sum of Three Hundred Sixty-four and 40/100 Dollars ($364.40). The debtor, having no knowledge that the claims were filed with the clerk of the Court, was unable to file objections to the allowance of said claim in the increased amount.

The notice of the hearing of the petition for confirmation of the plan of reorganization received by the appellees specifically referred them to the petition for confirmation. (Tr. page 106.) Had they examined this petition they would have known that no payments were to be made to them upon the entry of the order confirming the plan.

Appellees failed to appear at the hearing of this petition for confirmation of the plan. Had they appeared they could have been granted relief. [Bankruptcy Act, section 77Bc(6).] At that time leave to participate in the plan was given to a creditor, Yuba Gardens, who had not previously filed a claim with the Special Master. (Tr. page 71.)

Appellees failed to appear before the District Judge at the time set for the hearing of the Special Master's report recommending confirmation of the plan. (Tr. page 74.)

Although appellees knew from the plan itself, copies of which had been received by them, that the first payment, due under the plan, was due immediately upon confirmation thereof, and that at that time they were to receive the notes for the deferred payments, they took no steps to apprise the debtor that they claimed a right to share in distribution under the plan, until January 22nd, 1938, more than thirteen months after the confirmation of the plan.

Until January 22nd, 1938 neither the debtor nor its attorneys knew that appellees had disregarded the notice directed to them to file their claims with the Special Master, and that they had filed their claims with the clerk of the District Court.

The proposed plan, itself, copies of which were forwarded to appellees with a form of proof of claim, disclosed that the debtor proposed to borrow the money needed to make distribution. In December of 1936 the debtor borrowed the sum of Ten Thousand Dollars ($10,000.), approximately fifty per cent (50%) of the proved claims, from the Pacific Can Company so as to enable it to make the payments under the plan. The amount of the loan was based on the total claims of creditors who had filed claims with the Special Master. (Tr. pages 113, 114, 122.) The debtor has pledged its entire assets to the Pacific Can Company to secure this loan of Ten Thousand Dollars ($10,000.) and an additional indebtedness subsequently incurred (Tr. page 115) and the debtor is now indebted to additional unsecured creditors, including tomato growers and supply houses, which it

is unable to pay. (Tr. page 114.) The debtor now has no assets whatsoever to apply to the payment of appellees' claims.

Had the debtor known that appellees had filed their claims it would either have attempted to borrow additional money, or would have filed an amended plan, paying a lesser amount to its creditors.

The Circuit Court of Appeals for the Second Circuit had occasion to pass upon a similar situation.

In re Diana Shoe Corporation, 80 Fed. (2d) 92.

In that case the plan of reorganization was confirmed on April 16th. Appellant took no steps to have its claim allowed until after the plan had been confirmed when, on April 19th, it filed a motion that leave be given it to file a proof of claim *nunc pro tunc.* The Court called attention to the binding effect of the order confirming the plan and pointed out that if the appellant were to share in the proceeds, the amounts payable to other creditors would be reduced and that to give the other creditors less would be to put into effect a different plan to which they had never consented. The Court stated:

> "Assuming that cause was shown for lifting the bar order and allowing the tardy claim to be filed had the motion been made before confirmation of the plan on April 16, the motion of April 26th came too late."

The failure of the appellees in the instant case to receive distribution under the plan was due solely to their having disregarded the notice received by them

from the Special Master, and their having failed to file their claims with the Special Master.

The argument as to why the appellees' objections to the debtor's application for a discharge should have been overruled is well stated in the Special Master's report (Tr. page 141), from which we quote as follows:

> "Under the evidence herein, the debtor being without any funds over which the court could exercise jurisdiction, there would be but two ways in which the court could make provision for the pro rata payment of these negligent creditors, (1) compel the debtor, *which heretofore has acted strictly in accordance with the orders of this court,* itself directly to raise the money with which to make said payments, or (2) compel said debtor to proceed against those creditors of the same class as the negligent creditors to repay into debtor's estate, sufficient money to take care of these unpaid pro rata payments in each instance. Legally and equitably either of these methods would be violative of the doctrine of laches, of which it was said by the Supreme Court of the United States in *Galliher v. Cadwell,* 145 U. S. 368, 373, 12 S. Ct. 873, 875, 36 L. Ed. 738, 740, '* * * laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of property or the parties.' See, also, *Pickens v. Merriam* (C.C.A. 9), 242 F. 363, 371, to the same effect. 'A suitor in equity', declared the court in *Speidell v. Henrici,* 15 F. 753, 756, 'is required to be "prompt, eager, and ready," in the pursuit of his rights.

> Diligence is an essential condition of equitable relief, and unexplained negligence is never encouraged.' In the language of the Supreme Court of the United States in affirming the decree dismissing the bill in equity in the last cited case, *Speidel v. Henrici,* 120 U. S. 377, 387, 7 S. Ct. 610, 612, 30 L. Ed. 718, 720, declared, 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. "A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' " (Italics ours.)

Appellants, by their own negligence, have permitted a final order to be made confirming the plan of reorganization and directing payments to the thirty-five creditors who filed their claims with the Special Master. As a result of this order, the debtor's position has become unalterably changed, and the rights of its subsequent creditors who became such in reliance on the fact that appellees had not filed their claims have become fixed.

> "A final order is one which either terminates the action itself, or decides some matter litigated by the parties, or *operates to divest some right in*

such manner as to put it out of the power of the court making the order, after the expiration of the term, *to place the parties in their original condition.*" (Italics ours.)

Strull v. Louisville & N. R. Co., 25 Ky. Law 665, 76 S. W. 181.

III.

THERE IS NO EVIDENCE TO SUPPORT THE ORDER OF THE DISTRICT COURT DENYING APPELLANT'S PETITION FOR DISCHARGE.

(Point No. 1, Tr. page 159.)

THE DISTRICT JUDGE ABUSED HIS POWER IN DENYING APPELLANT A DISCHARGE FOR THE REASON THAT THE REPORT OF THE SPECIAL MASTER, AFTER DUE HEARING, RECOMMENDING APPELLANT'S PETITION FOR DISCHARGE, WAS SUPPORTED BY UNCONTROVERTED EVIDENCE AND WAS NOT ERRONEOUS.

(Point No. 8, Tr. page 161.)

This appeal is from an order rejecting a Special Master's report. The Special Master's report was based upon oral evidence taken before him, all of which is contained in his report, and no evidence was introduced before the District Judge. As we have heretofore shown, the uncontroverted evidence before the Special Master clearly disclosed laches upon the part of appellees and that appellant acted in accordance with the orders of the Court.

CONCLUSION.

It is therefore respectfully submitted that the order of the District Court dated September 13th, 1939, denying the debtor's petition for a final decree and discharge be reversed, and that said District Court be directed to enter an order in conformity with the recommendations of the Special Master finding and decreeing that the plan of reorganization heretofore confirmed has been fully executed, accomplished and carried out in accordance with all of the terms and provisions of said plan and the orders of the District Court in connection therewith, discharging the debtor from all of its debts, claims and liabilities, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy and terminating and finally closing the proceedings.

Dated, San Francisco, California,
February 16, 1940.

Louis Oneal,
Torregano & Stark,
By Ernest J. Torregano,
Attorneys for Appellant.